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No.

In the Supreme Court of the United States

MARGARET SPELLINGS, SECRETARY OF EDUCATION,
PETITIONER

v.

DEE ELLA LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Department of Education can collect defaulted student loans by offsetting a portion of a debtor's Social Security benefits without regard to the ten-year limitation period under the Debt Collection Act, 31 U.S.C. 3716(e)(1), given that Congress has expressly abrogated all otherwise applicable statutes of limitations for the collection of student loans.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Secretary of Education, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 376 F.3d 1179. The opinion of the district court (App., *infra*, 5a-14a) is reported at 276 F. Supp. 2d 980.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2004. A petition for rehearing was denied on

October 29, 2004 (Pet. App. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Title IV, Part E of the Higher Education Act of 1965 (HEA), 20 U.S.C. 1087aa *et seq.*, establishes the Federal Perkins Loan Program. Under the Perkins program, federal funds partially capitalize a loan fund established at a participating institution of higher education, which makes matching capital contributions to the fund. 20 U.S.C. 1087aa-1087cc; 34 C.F.R. 674.8. The institution may use the fund to issue loans to its students; the loans are repayable to the institution, which is responsible for servicing and collecting the loans. 20 U.S.C. 1087cc(a); 34 C.F.R. 674.16, 674.31-674.49.

Upon default by the student debtor, an institution may assign the Perkins loan to the Department of Education. 20 U.S.C. 1087cc(a)(4), 1087gg. 34 C.F.R. 674.50. The Department does not guarantee Perkins Loans, however, and makes no payment to the institution when it accepts an assignment of a defaulted Perkins loan or when it collects money from the borrower on the loan. 20 U.S.C. 1087(cc)(a)(4); 34 C.F.R. 674.8(d). Upon assignment of a Perkins loan, the Department of Education uses all available collection methods for collection on the loan. 20 U.S.C. 1087gg.

b. Various statutes provide for the effective and efficient collection of delinquent student loan debts. See, *e.g.*, 31 U.S.C. 3720A (tax refund offset); 5 U.S.C. 5514 (salary deduction for federal employees); 20 U.S.C. 1095a, 31 U.S.C. 3720D (salary garnishment for any employee); see also 11 U.S.C. 523(a)(8) (limiting student loan discharge in bankruptcy). One such statute is the Debt Collection Act, 31 U.S.C. 3701 *et seq.*, as amended by the Debt Collection Improvement Act, which estab-

lishes, *inter alia*, an administrative offset program. Under the administrative offset program, the Department of the Treasury withholds funds (such as income tax refunds) payable by the United States to an individual to satisfy a claim against that individual by a federal agency. 31 U.S.C. 3716(c), 3720A. The Debt Collection Act contains a limitation period, however, which provides that administrative offset is generally not available to collect "a claim * * * that has been outstanding for more than 10 years." 31 U.S.C. 3716(e)(1).

In 1991, Congress amended the HEA to abrogate all statutes of limitations that would otherwise be applicable to efforts to collect student loans. Congress achieved that result in 20 U.S.C. 1091a(a), which provides:

> Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken * * * for the repayment of the amount due from a borrower on a loan made under [Title IV of the Higher Education Act.]

20 U.S.C. 1091a(a)(2)(D). Congress further expressed that "[i]t is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced." 20 U.S.C. 1091a(a)(1). Accordingly, the Secretary of Education has determined that it is no longer subject to the Debt Collection Act's ten-year limitations period in seeking repayment of delinquent student loans by

administrative offset. See 20 U.S.C. 1091a(a)(2)(D) ("no limitation shall terminate the period within which * * * an offset" can be taken by the Secretary "for the repayment" of student loans). The Department of the Treasury has concurred in that view. 67 Fed. Reg. 78,936 (2002) (observing that debts for "education loans" "may be collected by offset legally if more than ten years delinquent").

c. Section 207 of the Social Security Act, entitled Assignment of Benefits, exempts Social Security benefits from any "execution, levy, attachment, garnishment, or other legal processes" unless another statute "express[ly]" makes reference to Section 207. 42 U.S.C. 407(a) and (b). Before 1996, the Debt Collection Act did not expressly refer to Section 207 in authorizing administrative offset.

In 1996, Congress amended the Debt Collection Act explicitly to make Social Security benefits subject to administrative offset under the Debt Collection Act. See 31 U.S.C. 3716(c)(3)(A)(i) ("Notwithstanding any other provision of law (including section[] 207 * * * of the Social Security Act) * * * all payments due to an individual under the Social Security Act * * * shall be subject to offset under this section."). The Debt Collection Act further provides that the first $9000 of each debtor's annual Social Security benefits shall be exempt from administrative offset. 31 U.S.C. 3716(c)(3)(A)(ii). Implementing regulations of the Department of Treasury further limit the amount of offset of benefits to the lesser of (i) the amount of the debt, including any interest, penalties and administrative costs; (ii) an amount equal to 15 percent of the monthly covered benefit payment; or (iii) the amount, if any, by which the monthly covered benefit payment exceeds $750. 31 C.F.R. 285.4(e). The Department of

the Treasury, after making necessary modifications to its computer system, regulations, and administrative procedures, began implementing the administrative offset program for Social Security benefits in May 2001 with full implementation in 2002. Financial Management Service, U.S. Dep't of the Treasury, *Fact Sheet: Delinquent Debt Collection, Fiscal Year 2004, Major Accomplishments* (visited Feb. 24, 2005) <http://fms.treas.gov/news.factsheets.delinquent_debtcollection.html>.

2. In 1978, Penn Valley Community College issued to respondent two Perkins student loans, one for $1400 and the other for $2000. App., *infra*, 6a. In 1984, respondent defaulted on both loans. *Ibid.* In 1987 and 1989, the $1400 and $2000 loans, respectively, were assigned to the Department of Education. C.A. App. 26.

Since 1989, nine different collection agencies unsuccessfully attempted to collect on respondent's defaulted loans. App, *infra*, 7a. Respondent made no further payments on the loans. C.A. App. 27-28. The Department thus sent respondent "numerous collection letters" and repeatedly discussed her student loan obligations with her over the phone. *Ibid.* The Department also notified respondent that, if she did not repay the debt, the agency would initiate the administrative offset procedure under the Debt Collection Act. *Id.* at 30-31. The Department also informed respondent that she could "avoid offset by making satisfactory arrangements to repay the loan obligation" and by "voluntarily pay[ing] off [her] debt through affordable monthly payments based on" her financial circumstances. *Id.* at 26, 30.

In October 2001, the Department of the Treasury began withholding $33 per month from respondent's

Social Security payment. No. 02-00489-CV-W-NKL Decl. of Sheryl Davis, Attach. R (W.D. Mo.). After respondent began receiving additional Social Security benefits, the government correspondingly increased the offset, first to $53 per month on February 1, 2002, and later to $64 per month on March 3, 2003. *Ibid.* By March 2003, the United States had collected by Social Security offsets a total of $693. C.A. App. 26. At that time, the total outstanding debt on both loans, including interest and administrative fees, was $4633.35. App., *infra*, 6a.

3. In June 2002, respondent filed a complaint against the Secretary of Education in the United States District Court for the Western District of Missouri, seeking declaratory and injunctive relief preventing the Secretary from continuing to offset her Social Security benefits. C.A. App. 7, 14. Upon the parties' cross-motions for summary judgment, the district court entered judgment in favor of respondent. App., *infra*, 5a-14a. The district court held that, with respect to Social Security benefits, the limitation provision under the Debt Collection Act prevailed over the HEA provision that abolished limitations periods for student loans, reasoning that Section 407 of the Social Security Act provides that Social Security benefits are not subject to offset unless another law makes "express reference to this section." 42 U.S.C. 407(b). The court recognized that the Debt Collection Act was amended in 1996 to make Social Security benefits subject to offset, and that Congress expressly referenced Section 407(b) in so doing. App., *infra*, 10a-11a. The court nonetheless concluded that, "[w]hen Congress removed all statute of limitations obstacles in [Section] 1091a [in 1991], it could not have contemplated that its actions would have any effect on Social Security payments

because such payments were not yet subject to offset." *Id.* at 11a.

4. The court of appeals affirmed in a per curiam opinion, based on "the reasons given in the district court's well-reasoned opinion." App., *infra*, 4a. The court of appeals also stated that Congress's approval in 1996 "of offsetting social security benefits did not import [Section] 1091a into the social security context, because Congress expressly left the ten-year disabling provision [in 31 U.S.C. 3716(e)(1)] intact." *Id.* at 3a.

5. On July 23, 2004, twelve days before the court of appeals' decision in this case, the Ninth Circuit issued its decision in *Lockhart* v. *United States*, 376 F.3d 1027 (2004). *Lockhart* held that the ten-year limitation period set forth in 31 U.S.C. 3716(e)(1) has no application to the Secretary of Education's offset of Social Security benefits to satisfy student loan debts. The Ninth Circuit found it "clear that in 1996, Congress explicitly authorized the offset of Social Security benefits, and that in the Higher Education Act of 1991, Congress had overridden the 10-year statute of limitations as applied to student loans." 376 F.3d at 1030.

The government petitioned for rehearing in this case, citing the Ninth Circuit's recent decision in *Lockhart*, but the court of appeals denied rehearing. App., *infra*, 15a. Three judges, Chief Judge Loken, and Judges Colloton and Gruender, would have granted the petition for rehearing en banc. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the same question that is presented in *Lockhart* v. *United States*, No. 04-881, petition for a writ certiorari filed (Dec. 29, 2004). In that case, the government today has filed a brief urging the

Court either to grant the petition for a writ of certiorari in *Lockhart* or to hold that petition pending the disposition of the petition in this case. Both cases concern whether the Debt Collection Act's ten-year statute of limitations applies to the collection of delinquent federal student obligations by Social Security offset. That question is of substantial and recurring importance to the federal student loan collection program. In the instant case, the court of appeals held that the Secretary of Education is bound by a ten-year statute of limitations, a holding that is directly contrary to the decision of the Ninth Circuit in *Lockhart*.

As explained in the United States' response to the petition in *Lockhart* (at 16), the record in this case is fully developed, and both courts below held that the ten-year time limit under the Debt Collection Act had expired and therefore bars the administrative offset of respondent's Social Security benefits. App., *infra*, 4a, 14a. This case therefore may represent a more suitable vehicle than Lockhart for the Court to consider the issue. Alternatively, should the Court grant review in *Lockhart*, the petition in this case should be held pending the disposition in *Lockhart*.[1]

1. The court of appeals erroneously held that the Secretary of Education, in seeking repayment of delinquent federal student loans by offsetting Social Security payments, is bound by the ten- year limitation period specified in the Debt Collection Act, 31 U.S.C.

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[1] If this Court decides to grant certiorari in both cases and consolidate them for oral argument, it may wish to consider also consolidating the cases for briefing purposes and realigning the parties as appropriate to minimize the number of separate briefs that would have to be filed. As the defendant in both cases, the government has no objection to being made respondent in both cases.

3716(e)(1). The Higher Education Act expressly abrogates all time restrictions on the collection of student loans, including those otherwise applicable to collection by way of offset. Thus, the HEA provides that, "*[n]otwithstanding any other provision of [law], * * * no limitation shall terminate the period within which * * * an offset*" can be taken by the government "for the repayment of" educational loans. 20 U.S.C. 1091a(a)(2)(D) (emphasis added). The plain terms of the HEA therefore remove any time limitation for conducting administrative offsets with respect to federal student loan debt.

There is no basis for limiting the plain language of the HEA and distinguishing offsets of Social Security payments from other mechanisms, such as offsetting tax refunds or salary deductions from an employee's salary. The district court erroneously relied (App., *infra*, 10a-12a) on the fact that 42 U.S.C. 407 requires an express Congressional statement to make Social Security benefits subject to administrative offset. The Debt Collection Act contains such an express statement, 31 U.S.C. 3716(c)(3)(A)(i), and thus satisfies the requirement of Section 407. No additional statement to the same effect was required in the HEA, because the HEA addresses the applicable statutes of limitations for the use of offsets in the collecton of student loans, but it is not the provision that *authorizes* administrative offset. Only the authorization of offset is governed by an express cross-reference rule, and the relevant authorization is provided by the Debt Collection Act in 31 U.S.C. 3716, which, as stated, expressly makes clear that (notwithstanding 42 U.S.C. 407(a)) Social Security benefits are subject to offset to satisfy a claim by the federal government.

Nor is the sequence of the two enactments significant. The court of appeals emphasized (App., *infra*, 2a), that Congress abrogated all limitation periods under the HEA in 1991, while Social Security benefits were not subject to offset until Congress amended the Debt Collection Act in 1996. That sequence does not provide any basis for ignoring the plain text of the provisions. The HEA operates by its own terms regardless of the date of passage of an otherwise applicable statute of limitations. 20 U.S.C. 1091a(a)(2) ("*Notwithstanding any other provision of statute*, * * * no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset * * * initiated or taken."). In any event, when Congress in 1996 explicitly made Social Security benefits subject to offset, Congress was necessarily aware that the HEA already had rendered the Secretary exempt from the Debt Collection Act's ten-year limitation period. The Secretary of Education accordingly may conduct Social Security offsets to collect petitioner's delinquent student loans without regard to the time limit under the Debt Collection Act.

2. a. The courts of appeals are divided over the question whether the Debt Collection Act's ten-year statute of limitations applies to the collection of delinquent student loans by administrative offset of Social Security benefits. In contrast to the decision here, the Ninth Circuit held in *Lockhart* that the Secretary of Education, in seeking repayment of delinquent federal student loans, has the authority to conduct Social Security offsets without regard to the ten-year period specified in the Debt Collection Act, 31 U.S.C. 3716(e)(1). Unlike the Eighth Circuit in this case, the Ninth Circuit found it "clear that in 1996, Congress explicitly authorized the offset of Social Security

benefits, and that in the Higher Education Act of 1991, Congress had overridden the 10-year statute of limitations as applied to student loans." 376 F.3d at 1030.

This Court's review is warranted to resolve the direct circuit conflict, which prevents the uniform administration of a central part of the federal student loan program. See *Clay* v. *United States*, 537 U.S. 522, 526 (2003) (a writ of certiorari was granted "[t]o secure uniformity in the application of" the federal statute); *Brotherhood of Locomotive Eng'rs* v. *Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 156 (1996) (a writ of certiorari was granted "[b]ecause of the importance of uniform nationwide application of" the federal regulatory scheme). The federal government has a substantial interest in ensuring that student loan collection proceeds on a uniform basis nationwide. *Brannan* v. *United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (the "federal student loan program * * * requires uniformly administered collection standards in order to remain viable"), cert. denied, 521 U.S. 1111 (1997). Only by applying consistent rules throughout the country can the federal government endeavor to hold each delinquent debtor accountable for her federal obligations. *Id.* at 1264-1266; see also *In re Murphy*, 282 F.3d 868, 870 (5th Cir. 2002) (the application of a "uniform[]" rule to student loan obligations "prevent[s] recent graduates from reneging on manageable debts" and helps "preserve the solvency of the student loan system"); cf. *Hodges* v. *Thompson*, 311 F.3d 316, 319 (4th Cir. 2002) (noting, in another context, that federal standards can serve to prevent individuals from "avoid[ing] their [financial] obligations simply by moving across local or state lines") (internal quotation marks omitted), cert. denied, 540 U.S. 811 (2003).

b. The Court's review is also warranted because the view adopted by the Eighth Circuit undermines the government's student loan collection efforts. The purpose of the HEA's abrogation of limitation periods is "to ensure that obligations to repay loans * * * are enforced without regard to any Federal * * * statutory * * * limitation on the period within which debts may be enforced." 20 U.S.C. 1091a(a)(1). Subjecting Social Security offsets to a ten-year limitation period frustrates that purpose and significantly reduces the effectiveness of an important collection mechanism.

The offset process has proven to be an effective means of addressing the problem of student loan defaults. Thus, during the years 2000-2003, the Secretary of Education collected through the offset program approximately $400 million per year in delinquent student loan debt. Financial Management Service, U.S. Dep't of the Treasury, *Fiscal Year 2003 Report to Congress: U.S. Government Receivables and Debt Collection Activities of Federal Agencies* 19 (2004).

The Secretary's ability to offset Social Security benefits for delinquent loans that are more than ten years old is integral to the success of the offset program. Administrative offset in such circumstances typically occurs only because the student debtor has successfully evaded for many years (or even decades) all other efforts to collect the debt by the lender, the guaranty agency, and the Secretary of Education. Moreover, the vast majority of recipients of federal student loans receive such financial assistance under the HEA when they are young adults. Many such student loan debtors will not begin to receive Social Security benefits until they reach retirement age, which may occur many years after the Department of Education is entitled to collect on defaulted student

loan debts. For instance, the Department of Education advises us that, as of August 13, 2004, the Secretary had certified to the Department of the Treasury almost $7 billion in delinquent student loan debt, and that over half of that amount, *i.e.*, approximately $3.6 billion, reflected student loan debt over ten years old. For individuals having student loan debt who do not receive Social Security benefits until more than ten years after the Secretary is entitled to collect on the loans, the rule adopted by the Eighth Circuit would deprive the Secretary of the most efficient (and, in many instances, the only) means of collecting delinquent debt to the United States.

Application of a ten-year limitation period would also harm the agency's collection efforts with respect to individuals such as respondent, who begin receiving Social Security benefits, such as disability benefits, before retirement. App., *infra*, 7a. The Debt Collection Act and implementing regulations limit the amount of Social Security benefits that are subject to offset. 31 U.S.C. 3716(c)(3)(A)(ii); 31 C.F.R. 285.4(e). It therefore could take considerably more than ten years to collect many delinquent student loan obligations. A lengthy collection period is therefore necessary for the Secretary of Education to ensure maximum collection of delinquent student loans.[2]

Congress has expressly determined in the HEA that the Secretary of Education should have an unlimited

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[2] For individuals with a disability, the Department of Education's regulations permit administrative discharge upon a showing of total and permanent disability. 42 C.F.R. 682.402(c), 685.212(b), 674.61(b). The Department's records do not reflect that respondent sought to avail herself of those regulations to discharge his debt.

amount of time to enforce student loan obligations. 20 U.S.C. 1091a(a). This Court's review of the issue is necessary to ensure that Congress's intent is evenly administered throughout the country.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the petition should be held pending the Court's disposition of *Lockhart* v. *United States*, No. 04-881.

Respectfully submitted.

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FEBRUARY 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3819

DEE ELLA LEE, APPELLEE

v.

RODERICK PAIGE, SECRETARY OF THE DEPARTMENT OF EDUCATION, APPELLANT

[Filed: Aug. 4, 2004]

OPINION

Before: MORRIS SHEPPARD ARNOLD, MCMILLIAN, and MELLOY, Circuit Judges.

PER CURIAM.

Roderick Paige, Secretary of the United States Department of Education, appeals from a grant of summary judgment entered in favor of Dee Ella Lee, contending that the district court[3] incorrectly barred the department from garnishing Ms. Lee's social security benefits on account of her outstanding student loans. We affirm.

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[3] The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

Ms. Lee defaulted on two student loans in 1984. The Department of Education took assignment of the loans in the late 1980's and has sought repayment ever since. In October, 2001, the government began withholding a portion of Ms. Lee's social security benefits, applying the amount to Ms. Lee's outstanding loan balance. She filed suit to stop the government from garnishing her benefits.

The dispute between Ms. Lee and Secretary Paige requires the synthesis of three separate acts: the Social Security Act, the Debt Collection Act (as amended by the Debt Collection Improvement Act), and the Higher Education Act.

The Higher Education Act, passed in 1991, eliminated statutes of limitations on the government's right to seek repayment on defaulted federal student loans, providing that "[n]ot withstanding any other provision of statute, . . . no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset [or] garnishment . . . initiated or taken." 20 U.S.C. § 1091a(a)(2). At the time that the Higher Education Act became law, the Debt Collection Act authorized the government to offset unpaid debt balances from some federal payments but not from social security benefits. See 31 U.S.C. § 3716 (1988); 42 U.S.C. § 407 (1988). Congress later passed the Debt Collection Improvement Act, which authorizes federal agencies to recover money owed on delinquent student loans (as well as some other debts) by offsetting a debtor's social security benefits. See 31 U.S.C. § 3716(c)(3)(A)(i). The Debt Collection Improvement Act left unchanged, however, the original Debt Collection Act's limitation on the right of offset, under which government agencies are not allowed to use the remedy

of administrative offset on claims that have been outstanding in excess of ten years. See 31 U.S.C. § 3716(e)(1).

Though he concedes that the claims against Ms. Lee had been outstanding for more than ten years, Secretary Paige nonetheless argues that the ten-year limitation in the Debt Collection Act did not prohibit the administrative offset of Ms. Lee's benefits because that would be contrary to § 1091a(a)(2), which had eliminated statutes of limitations. Instead, he maintains that the ten-year disabling provision in § 3716(e)(1) should control all claims except those like the collection of student loans, where Congress eliminated all statutes of limitations. Ms. Lee argues that the disabling provision of § 3716(e)(1) was intentionally left in the statute and that it controls this case.

The district court agreed with Ms. Lee. See *Lee* v. *Paige*, 276 F. Supp. 2d 980 (W.D. Mo. 2003). The court reasoned that when "Congress removed all statute of limitations obstacles in § 1091a, it could not have contemplated that its actions would have any effect on Social Security payments, because such payments were not yet subject to offset," *id.* at 984, and subsequent Congressional approval of offsetting social security benefits did not import § 1091a into the social security context, because Congress expressly left the ten-year disabling provision intact. Had Congress intended to limit the disabling provision to allow the government unlimited offset opportunities for the collection of delinquent student loans, the district court reasoned, it would have done so explicitly. In the absence of Congressional language authorizing application of § 1091a to social security offsets, the district court concluded

that the specific limitations in § 3716(e)(1) prevail. *Id.* at 983-84.

We review *de novo* a district court's interpretation of a statute. *Loehrer* v. *McDonnell Douglas Corp.*, 98 F.3d 1056, 1061 (8th Cir. 1996). We affirm the judgment for the reasons given in the district court's well-reasoned opinion. The Department of Education remains free to pursue payment on the defaulted loans from Ms. Lee; it simply cannot take money from her monthly social security check to reduce the debt.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

No. 02-489-CV-W-GAF

DEE ELLA LEE, PLAINTIFF

v.

RODERICK PAIGE, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, DEFENDANT

July 25, 2003

ORDER

FENNER, District Judge.

Now before the Court are two cross motions for summary judgment. Plaintiff Dee Ella Lee ("Lee") filed a motion for partial summary judgment asking the Court to find that the Defendant, Roderick Paige, Secretary of the United States Department of Education, ("Education") has been improperly offsetting Lee's Social Security benefits in order to collect on two student loans that are both over twenty years old. In response, Education filed its own motion for summary judgment arguing that it had the power to offset Lee's Social Security benefits, that such offsets did not violate due process, that the retroactive abrogation of the statute of limitations regarding the collection of

Lee's debts did not violate due process, and that such offsets were not barred by the doctrine of laches.

DISCUSSION

I. Facts

There are very few facts underlying the present motions and they are, in large part, uncontroverted. In 1978, Lee took out two Perkins Loans to fund her studies at Penn Valley Community College. Perkins Loans are distributed from a fund capitalized by Education through contributions of Federal money that is distributed by secondary education institutions.

The first loan Lee obtained was in the amount of $1,400. Lee, who was 43 and on Social Security at the time, signed a promissory note vowing to repay the loan. In early 1981, Lee entered into a repayment plan for the loan, however she defaulted in 1984. Lee made no further voluntary payments on the loan and, in 2001, Education began offsetting Lee's Social Security payments in order to repay the loan. Education claimed it was authorized to offset Lee's benefit payments under the Treasury Offset Program. As of March 2003, the total amount owing on this loan, including interest and fees, was $1,938.80.

The second loan Lee obtained was drawn in the fall of 1978 in the amount of $2,000. This loan, like the prior loan, entered into repayment in 1981. In addition to defaulting on the payment of the previous loan, Lee also defaulted on repayment of this loan in 1984. Education offset Lee's Social Security payments to collect on this loan as well. The total amount owing on this loan, as of March 2003, was $2,694.55.

The offsetting of Lee's Social Security payments is the latest in a long history of collection attempts

undertaken by Education. Since 1989, nine different collection agencies have attempted to collect the overdue amounts from Lee. Lee previously received Social Security payments of $814 per month. After Education began offsetting her benefits, they were reduced to $750 per month. Lee has been unable to have the loans forgiven because she had a pre-existing disability when she obtained the loans.

Lee filed the current lawsuit alleging that the offset of her Social Security payments is not authorized by the administrative offset statute, 31 U.S.C. § 3716. She has since moved for partial summary judgment on the issue of whether Education is authorized to offset her Social Security benefits. Lee argues that § 3716, which allows government agencies to offset certain government payments, such as Social Security, does not allow offsets for claims that are over ten years old. Lee asserts, and it is apparently uncontested, that the claims of default on her two student loans are older than ten years. As such, argues Lee, Education is precluded from offsetting her Social Security payments under the plain terms of § 3716. In the alternative, Lee argues that the offsetting of her benefits, if statutorily permissive, violates the due process clause and the doctrine of laches. Assuming that Education cannot offset her Social Security payments, Lee argues that the retroactive elimination of the prior six-year statute of limitations by § 1091a violates due process.

Education contends that the offsetting of Lee's benefits is permissible despite the 10-year limitation in § 3716. It points to 20 U.S.C. § 1091a which states that no federal or state statutes of limitations or other regulations shall prevent Education from collecting on student loans. According to Education, this statute

removes all statutes of limitations obstacles which would otherwise prevent the collection of old loans. Education asserts that § 3716 cannot be read to impose a 10-year limitation on the offset of Social Security benefits for the purpose of paying student loans because such a restriction would overrule the unlimited grant of time contained in 20 U.S.C. § 1091a. Education proceeds to argue that the practice of offsetting Lee's benefits does not violate due process because the decision to offset was a reasonable determination by Education and because Lee had adequate notice and time in which to contest the offset. Furthermore, Education claims that laches does not apply because it has been trying to recover payment for the loans since 1989, hence there is no undue delay in its efforts.

II. Standard

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Inland Oil and Transport Co.* v. *United States*, 600 F.2d 725, 727-28 (8th Cir. 1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts* v. *Browning*, 610 F.2d 528, 531 (8th Cir. 1979);

United States v. *Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); see also *City of Mt. Pleasant* v. *Associated Elec. Coop., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 324, 106 S. Ct. 2548.

At the summary judgment stage the judge's function is not to weigh the credibility of the evidence, but rather to determine whether a genuine issue of material fact exists. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." *Id.*, 106 S. Ct. at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (footnote omitted).

III. Analysis

The key issue in this controversy is whether Education is authorized to offset Lee's Social Security benefits in order to collect on claims more than ten years old. Resolution of that issue depends entirely on statutory

construction, a quintessentially legal matter. If this Court concludes that Education is not authorized to offset Lee's benefits, her claims of violation of due process and of the doctrine of laches are rendered moot.

After a review of the arguments presented by Lee and Education, and after an examination of the plain language of the respective statutes, the Court concludes that Education's argument regarding the applicability of § 1091a to offsets of Social Security benefits cannot be sustained. The Court is persuaded by the decision of *Guillermety* v. *Secretary of Education*, 241 F. Supp. 2d 727 (E.D. Mich. 2002). This opinion is highly persuasive, despite its foreign jurisdiction status, because it is factually similar to the present case and because it confronts arguments identical to those made by Education in the current motion. The Court adopts the reasoning of the *Guillermety* decision and highlights a few key points.

Congress has provided that Social Security benefits cannot be offset unless § 407(b) of the Social Security Act is specifically referenced in the offset authorizing statute. See 42 U.S.C. § 407(b). In 1991, Congress eliminated all statutes of limitations on the collection of student loans but, in so doing, did not explicitly reference § 407(b) of the Social Security Act. See 20 U.S.C. § 1091a. The effect of this law was to abrogate all statutes of limitations that would have barred the collection of past due student loans. This abrogation was even applied retroactively. See *U.S.* v. *Phillips*, 20 F.3d 1005 (9th Cir. 1994). At the time Congress passed § 1091a, governmental agencies were not allowed to offset or garnish Social Security benefits. In 1996, Congress permitted the offsetting of Social Security benefits in order to collect on debts, including student loan

debts, specifically referencing § 407(b). See 31 U.S.C. § 3716(c)(3)(A)(i). However, Congress also stated that the administrative offset provision, allowing government to offset Social Security payments, did not apply to claims older than ten years. 31 U.S.C. § 3716(e)(1).

Education argues, as it did in *Guillermety*, that the ten-year restriction cannot apply to Education's offsets because to conclude otherwise would overrule § 1091a, which Congress did not intend to do. See Def. Opp. at 25. Rather, asserts Education, the proper harmonization of these two statutes is to find that the ten-year limitation in § 3716(e)(1) is negated by Congress' clear intention to allow unlimited time to collect student loans as evidenced in § 1091a. As was recognized by the court in *Guillermety*, such a position is untenable.

The major flaw in Education's argument stems from the chronology of the enactment of the statutes involved. Congress enacted § 1091a prior to enacting § 3716. When Congress removed all statute of limitations obstacles in § 1091a, it could not have contemplated that its actions would have any effect on Social Security payments because such payments were not yet subject to offset. Congress did not allow for Social Security payments to be reduced to pay outstanding debts until 1996, when it passed § 3716. It does not follow that an earlier general provision, § 1091a, overrides a later, more specific provision, § 3716. See *Guillermety*, 241 F. Supp. 2d at 753. This is especially true in light of the fact that Congress could have, but did not make an exception in § 3716(e)(1) for student loans.

A better reading of § 3716 and § 1091a would be the following: Congress declared in 1091a that there would no limitations on when student loans could be collected.

This statute controls the time for collecting past due amounts. In § 3716, Congress allowed for Education to reach various sources as a means of offsetting past due claims, but provided that Social Security benefits could not be offset for claims over ten years old. This statute controls the sources of funds to which Education can look to satisfy its claim. Section 3716 does not limit Education's time in which to collect student loans, rather it limits Education's ability to look to Social Security benefits for repayment. In short, Education is still entitled to pursue it's the collection of Lee's student loans. It may not however, look to Lee's Social Security benefits to collect.[4] Due to the age of its claims against Lee, Education is not authorized, in this case, to satisfy its claim by offsetting Lee's Social Security benefits.[5]

Which brings to the fore, Lee's claim that the retroactive application of § 1091a to her situation violates due process. Lee concedes that the retroactive application of statute of limitations changes does not, per se, violate due process. See Pl. Reply at 7 (citing *Chase*

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[4] As the court in *Guillermety* noted, the reason for this derives from the nature of Social Security benefits. "Social Security benefits . . . are designed to provide recipients with funds to meet their most basic needs, e.g., food, shelter, medicine." *Guillermety*, 241 F. Supp. 2d at 754 n.25. Further evidence of the unique nature of Social Security payments is found in the fact that Congress has imposed limitations upon itself with regard to the offset of such benefits stating that attachment will only be authorized by express, statutory reference to § 407(b) of the Social Security Act. See *Id.*

[5] Because the Court finds that Education may not offset Lee's Social Security benefits in order to collect on her overdue loans, the Court does not consider her claims that such offsets violated due process or the doctrine of laches.

Sec. Corp. v. *Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945)). Lee instead argues that abrogating the six-year statute of limitations on contract claims would work a "special hardship" upon Lee, or would have an "oppressive effect." See Pl. Reply at 7. Lee claims that the "extreme delay" on the part of Education in pursuing repayment of the loans has caused her to lose memory and paperwork relating to the loans. However, Lee does not dispute that she took out the loans. She does not dispute that she owes money on the loans. She does not dispute that Education, in order to collect on the loan, has utilized nine different collection agencies over the course of twelve years. She also admits that she has received repeated calls and letters inquiring about her failure to pay on the loans. These facts present the clear impression that, if there has been any extreme delay, it has been Lee's delay in paying her undisputed obligations. The Court is sympathetic to the fact that Lee has limited income from her Social Security benefits. However, Lee does not cite to any case law which holds that the loss of paperwork, memory, or even the inability to pay a debt constitutes a "special hardship" for purposes of retroactively abrogating a statute of limitations. In the present case, Lee's hardship stems from the fact that she has limited income, not from the fact that Education is able to pursue collection without regard to statutes of limitations. For these reasons, Lee's claim that the retroactive application of § 1091a violates due process is infirm.

CONCLUSION

For the above reasons, Plaintiff Dee Ella Lee's Motion for Partial Summary Judgment is GRANTED. Defendant Roderick Paige, Secretary of the Depart-

ment of Education's Motion for Summary Judgment is GRANTED IN PART, and DENIED IN PART. Accordingly, it is ORDERED as follows:

1) Defendant has no authority, under 31 U.S.C. § 3716 to offset Plaintiff's Social Security payments in order to satisfy outstanding student loan debts, because Education's claims are more than ten years old.

2) Defendant is hereby enjoined from any future offsets of Plaintiff's Social Security benefits.

3) Such ruling does not preclude the ability of Defendant to continue to look to Plaintiff for payment of her debts.

4) Retroactive application of 20 U.S.C. § 1091a does not violate Plaintiff's due process rights under the Fourteenth Amendment to the United States Constitution.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3819

DEE ELLA LEE, APPELLEE

v.

RODERICK PAIGE, SECRETARY OF THE DEPARTMENT OF EDUCATION, APPELLANT

Oct. 29, 2004

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge LOKEN, Judge COLLOTON and Judge GRUENDER would grant the petition for rehearing en banc.

Order Entered at the Direction of the Court:

/s/ MICHAEL E. GANS
MICHAEL E. GANS

Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
MAR 2 5 2005
OFFICE OF THE CLERK

No. 04-1139

In The

Supreme Court of the United States

MARGARET SPELLINGS,
SECRETARY OF EDUCATION,

Petitioner,

v.

DEE ELLA LEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Do the Social Security Act and the Debt Collection Improvement Act bar the United States from withholding Social Security benefits to collect student loan debt that has been outstanding for more than ten years, or does the Higher Education Act eliminate any such bar?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent Dee Ella Lee respectfully submits that the petition for certiorari should be denied.

STATEMENT

1. Statutory Framework

This case presents the question of whether the government may seize Social Security benefits to collect student loan debt that has been outstanding for more than ten years. Resolution requires the analysis of four statutory provisions enacted over several decades. The chronology of these provisions contained within the Social Security Act, the Higher Education Act, and the Debt Collection Act (as amended by the Debt Collection Improvement Act) is important to understanding how the Eighth Circuit reached the decision below.

a. The Social Security Act of 1935

The Social Security Act of 1935, as amended, establishes a social insurance program for wage earners and their dependents, 42 U.S.C. § 401 *et seq.*, and a public assistance program for people who are blind, aged, or disabled and have low income. 42 U.S.C. § 1381 *et seq.*

The benefits paid under the Social Security Act are protected by a strict anti-alienation provision. This provision states that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a). As this Court has

recognized, "[t]he language is all-inclusive." *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 415 (1973). "[I]t imposes a broad bar against the use of any legal process to reach all social security benefits." *Id.* at 417.

In 1983 Congress provided additional strength to the already comprehensive protection afforded by the anti-alienation provision, in response to bankruptcy court decisions, allowing the attachment of Social Security benefits by bankruptcy trustees based on the supposed repeal by implication of section 407 by the Bankruptcy Reform Act. See Pub. L. No. 98-21, § 335(a) (1983), reprinted in 1983 U.S.C.C.A.N. 443. Congress added a unique requirement to the anti-alienation provision: "No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." 42 U.S.C. § 407(b).

b. The Debt Collection Act of 1982

Federal agencies, including the Secretary of Education, have several methods to collect debts owed to the United States. In addition to filing suit to obtain or collect a judgment, the Secretary of Education may collect student loan debts through extra-judicial means. For example, even without a judgment, agencies may collect a debt by directing the Department of the Treasury to intercept tax refunds, 31 U.S.C. § 3720A, or, where a debt is owed by a federal employee, by deducting part of the employee's salary, 5 U.S.C. § 5514. The Department of Education also has the extra-judicial authority to garnish the wages of

private employees by issuing administrative garnishment orders. 20 U.S.C. § 1095a.

This case involves another debt collection tool, "administrative offset," authorized by the Debt Collection Act of 1982 (DCA), 31 U.S.C. § 3716(a). Administrative offset is the withholding of money payable by the United States to a person to satisfy a debt the person owes to the government. 31 U.S.C. § 3701(a)(1). The Treasury Department operates the Treasury Offset Program, which is used by federal agencies and states to collect debt by offsetting federal payments, including tax refunds and federal salaries. Federal agencies, such as the Department of Education, which have been unable to collect claims against a debtor, can certify nontax debts which are over 180 days delinquent to be collected by administrative offset. The officials disbursing payments on behalf of federal agencies then withhold funds to pay the claim.

The Debt Collection Act specifically exempts two categories of claims from administrative offset. Administrative offset authority does not apply "to a claim under this subchapter that has been outstanding for more than 10 years" or "when a statute explicitly prohibits using administrative offset or setoff to collect the claim or type of claim involved." 31 U.S.C. § 3716(e) (originally codified at 31 U.S.C. § 3716(c)).

The government's administrative offset authority did not initially extend to Social Security benefits due to the anti-assignment provision of the Social Security Act.

c. 1991 Amendment to the Higher Education Act of 1965

In 1991 Congress sought to ensure that student loan debts would be enforceable without regard to state or federal limitations periods. The Higher Education Act of 1965 (HEA) was amended to provide: "Notwithstanding any other provision of statute, regulation, or administrative limitation, no limitation shall terminate the period within which suit may be filed, a judgment may be enforced, or an offset, garnishment, or other action initiated or taken by" the Secretary of Education or another government agency "for the repayment of [a student loan] . . . that has been assigned to the Secretary." Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, § 3, 105 Stat. 123, 124 (1991) (codified at 20 U.S.C. § 1091a(a)(2)).

The legislative history indicates that Congress was concerned with the government's collection of student loan debt through the offset of tax refunds, as authorized by 31 U.S.C. § 3720A. The amendment was a response to *Grider v. Cavazos*, 911 F.2d 1158, 1164-65 (5th Cir. 1990) (holding that "an assigned student loan debt which is time barred for collection by lawsuit cannot be collected by tax refund offset" for debts over ten years old). See 137 Cong. Rec. H1808, H1810 (1991) (statement of Rep. Ford) (noting that the amendment "overcomes a recent circuit court decision that puts in jeopardy the ability of the Department of Education to collect defaulted student loans through offsets of income tax refunds and other means").

The 1991 HEA amendment did not make express reference to the Social Security Act's anti-alienation provision. At the time the amendment was enacted, the

government did not have the authority to offset Social Security benefits under any circumstances.

d. The Debt Collection Improvement Act of 1996

Congress enacted the Debt Collection Improvement Act (DCIA) in 1996, which amended the Debt Collection Act by expanding administrative offsets. Pub. L. No. 104-134, Title III, § 31001(a)(2), 110 Stat. 1321-358 (1996) (codified at 31 U.S.C. § 3716). The DCIA, for the first time, authorized the limited withholding of Social Security payments through administrative offset by making the required "express reference" to the Social Security anti-alienation provision. 31 U.S.C. § 3716(c).

Section 3716 imposes several important safeguards and limitations on offsets. For example, the first $9,000 of Social Security or other payments are exempt from offset. *Id.* § 3716(c)(3)(A)(ii). Administrative offsets may only be imposed after the debtor has been given notice of the agency's claim and the opportunity to contest the debt. *Id.* § 3716(a).

Most important, the DCIA retained the DCA's ten-year statute of limitations, which had previously been codified at 31 U.S.C. § 3716(c). The DCIA prohibits administrative offset of any claim "that has been outstanding for more than 10 years." 31 U.S.C. § 3716(e)(1).

The DCIA's legislative history shows that Congress was concerned about the impact that administrative offset would have on elderly and disabled Social Security beneficiaries and intended the government to strictly observe safeguards and limitations on its offset authority. "Such

safeguards are critical," the Conference Report emphasized, "when benefits such as Social Security are the sole or major source of income for the debtor." H.R. Conf. Rep. No. 104-537, 104th Cong., 2d Sess., 142 Cong. Rec. H3842, H4042-43 (Apr. 25, 1996).

2. Factual Background

In October 2001 the Department of Education initiated offset of Dee Ella Lee's Social Security benefits. C.A. App. 16. (The Eighth Circuit Court of Appeals Appendix shall be referred to as "C.A. App.") Ms. Lee's Social Security payment, her sole source of income, was reduced from $814 to $750 per month. Pet. App. 7a. Her Social Security benefits are her only means to pay all of her basic living expenses: rent, food, utilities, personal necessities and medical supplies. C.A. App. 38.

Ms. Lee began receiving Social Security disability payments in 1973 after many years of working. C.A. App. 37. Despite her disability, she wished to return to work by becoming an English teacher. She enrolled at Penn Valley Community College and then the University of Missouri – Kansas City to finish her college education. C.A. App. 37-38. She obtained two National Direct Student Loans (now called "Perkins" loans) of $1400 and $1500 from the two schools to complete her studies. C.A. App. 38. (The district court below stated that the second loan amount was $2,000 based upon the assertions of the government; however, Ms. Lee disputes this amount. Pet. App. 6a.) Although she ultimately received her college degree, she was unable to return to work because of continuing health problems. C.A. App. 38.

She has been unable to repay the loans since her Social Security income is barely sufficient to meet her necessary living expenses. C.A. App. 38. Ms. Lee requested that the Department of Education forgive the loans because of her disability, but her request was denied because she had a pre-existing disability when she obtained the student loans. C.A. App. 39.

Ms. Lee obtained her two student loans in 1978. Pet. App. 6a. When Ms. Lee was unable to return to work and make payment on the loans, they were declared in default in 1984. *Ibid.* The Department of Education took assignment of the loans on December 29, 1987, and September 27, 1989. C.A. App. 26. The Department of Education initiated seizure of Ms. Lee's Social Security payments under the "Treasury Offset Program." C.A. App. 26.

REASONS FOR DENYING THE PETITION

1. This case does not present a question of substantial or recurring importance, and pending legislation could overturn the decision entered below. The issue is whether or not the Department of Education may initiate offset of Social Security benefits to satisfy an unpaid student loan which has been outstanding for more than ten years. By pure coincidence two courts of appeal rendered decisions on this issue within a few days of each other. In this case the Eighth Circuit held that the Department of Education was prohibited by the Debt Collection Act's ten-year statute of limitations from offsetting Ms. Lee's Social Security benefits. In the Ninth Circuit case of *Lockhart v. United States*, 376 F.3d 1027 (9th Cir. 2004), the court held that the ten-year statute of

limitations in the Debt Collection Act could not be applied to delinquent student loans. As explained below, the Eighth Circuit reached the correct result.

While the Ninth Circuit and Eighth Circuit reached a different result, there is no matter of importance which compels this Court's review.

Although two courts of appeal addressed the issue within days of each other, this is not a frequently litigated question. Since the offset law was implemented in 2001, virtually no litigation has occurred concerning the questions presented by this case and *Lockhart*. Only one other case, *Guillermety v. Secretary of Education*, 241 F. Supp.2d 727 (E.D. Mich. 2002), has addressed this issue. Ms. Lee has been unable to find any unreported decisions which considered the question presented in this case. Far from being a recurring issue, these three cases seem to be the *only* cases deciding the question presented. Neither this case nor *Lockhart* raised class action claims, and the decisions adjudicated the rights of a single individual.

The Department of Education argues that the decision below could put the agency in the position of enforcing different rules in different geographic areas. While that is true in the abstract, no substantial burden on the agency is apparent. As mentioned above, virtually no individuals have attempted to challenge the offset provisions. If an individual chooses not to raise the statute of limitation as a defense, the agency may continue collection efforts. Certainly no burden is placed upon the agency by those who acquiesce in the offsets. Given the dearth of litigation on this subject, it appears that the Department of Education's burden would be minimal, at most.

Even if the Department of Education needs immediate action in the interest of nationwide uniformity, there is no explanation why a legislative solution could not resolve this question. In fact, several reasons suggest that a legislative solution is likely and perhaps preferable.

First, the decisions in this case and *Lockhart* are just a few months old. Even before the decisions were final, legislation was proposed to allow the extension of the offset provisions as urged by the Department of Education. Legislation submitted September 15, 2004, would have permitted the government to engage in the very practice the court below held was prohibited by current federal law: the offset of Social Security benefits to collect debt outstanding for more than ten years. The provision was included in a significant appropriations bill before the expiration of the last congressional session. See Transportation, Treasury and General Government Appropriations Act, S. 2806, 108th Cong., 2d Sess., § 642 (2004). An accompanying Senate Report states that this provision would have amended 31 U.S.C. § 3716(e) to eliminate "the 10-year statute of limitations period applicable to the offset of Federal non-tax payments." S. Rep. 108-342, 108th Cong., 2d Sess. (2004) at 205. This legislation was not acted upon in the brief period before expiration of the legislative term.

On March 17, 2005, a bill was introduced in Congress with the specific purpose of amending the Debt Collection Act "to eliminate the 10-year limitation on the collection of nontax debt." H.R. 1427, 109th Cong., 1st Sess. (2005). The bill would eliminate the current language in § 3716(e)(1) limiting offset to debts outstanding for no more than 10 years and replace it with language that the offset procedure "applies to a claim under this subchapter regardless of the period it has been outstanding."

Although this legislation has not yet been acted upon, it establishes that Congress has been fully informed of the court decisions rejecting the government's position and presumably will overturn those decisions if it disagrees with them.

Second, when confronted with a court decision limiting the tax offset program to a ten year period, Congress did act. In *Grider v. Cavazos*, 911 F.2d 1158, 1164-65 (5th Cir. 1990), the court held that "an assigned student loan debt which is time barred for collection by lawsuit cannot be collected by tax refund offset" if the debt is over ten years old. Congress acted promptly by amending the Higher Education Act in 1991 to remove the limitation period, noting the amendment "overcomes a recent circuit court decision that puts in jeopardy the ability of the Department of Education to collect defaulted student loans through offsets of income tax refunds and other means." 137 Cong. Rec. H1808, H1810 (1991) (statement of Rep. Ford.)

It is suggested that a legislative solution may be appropriate given the arguments raised by the Department of Education. It is clear that Congress has been uniquely concerned with the protection of Social Security benefits for decades and with the amendment to 42 U.S.C. § 407(b) emphasized the broad-ranging limitation placed upon congressional actions, unless those particular actions make "express reference" to the Social Security Act. On the other hand, the Department of Education contends that the collection of student loan debt is also a matter of important congressional concern. If the Department of Education's argument is correct, then the question presented involves a process of attempting to define, from meager legislative history, congressional intent when

these two important legislative prerogatives collide. Given the infancy of the decisions in this case and *Lockhart*, a reasonable alternative is to at least allow Congress an opportunity to address the issues raised by the offset of Social Security benefits for student loans outstanding for more than ten years.

If Congress does not act on this issue, other circuits may have the opportunity to revisit the analysis of these statutory provisions. It is apparent that the courts in this case and *Lockhart* were unaware of the pending actions in the other circuit. Neither of these decisions addressed the analysis contained in the other. Neither decision took a strident position on the issues raised and decided in the other circuit, leaving further synthesis of issues a viable option for future decisions.

2. The Department of Education suggests that this case may have a marginally better record than *Lockhart* and, therefore, present a more suitable vehicle for review of this issue. Pet. 8. Ms. Lee disagrees. Although *Lockhart* presented the legal question in the posture of a dismissal of the complaint, the legal issue is identical in both cases. The individuals in this case and *Lockhart* both had student loans outstanding for at least ten years. While the decision in this case was on the merits, the records in both cases appear to be substantially similar. In this case the entire factual record consists of two affidavits, one by Ms. Lee outlining her student loan history (C.A. App. 37) and one from a Department of Education employee outlining the status of Ms. Lee's outstanding student loan obligation. C.A. App. 23.

The Department of Education states that there are no records indicating that Ms. Lee requested an administrative discharge of her student loan obligation because of a total and permanent disability. Pet. 13, footnote 2. In fact, agency records reflect that Ms. Lee did request a discharge of her debt because of disability; however, the agency on April 10, 1992, determined she was ineligible for loan cancellation because her disability existed prior to disbursement of her student loans. In those circumstances an applicant for a disability discharge must show that her condition has substantially deteriorated since she submitted her loan application. 34 C.F.R. § 682.402(c)(1)(iii). Since her only income has been Social Security benefits, Ms. Lee has never had sufficient funds to repay her student loan. C.A. App. 38. Ms. Lee retains the option of requesting a disability discharge of her student loan upon a showing of substantial deterioration in her condition since she received her loans in 1978.

3. The decision of the Eighth Circuit is correct. Since only three reported cases exist on this issue, the chronology of litigation is simple. The first reported case is *Guillermety v. Secretary of Education*, 241 F. Supp.2d 727 (E.D. Mich. 2002). After a comprehensive review of the statutes and legislative history, *Guillermety* found that Social Security benefit offsets were not permissible for student loans outstanding for more than ten years. As in this case, Education argued that express reference to the Social Security anti-alienation provision, 42 U.S.C. § 407, was not necessary, because the 1991 Higher Education Act (HEA) amendment did not limit or modify the anti-alienation provision but instead merely overrode the ten-year limitations period in the Debt Collection Act (DCA), thereby extending the government's authority to offset

Social Security benefits to collect student loans outstanding for more than ten years. *Id.* at 751. The court disagreed for several reasons.

First, the court explained that section 407(b) specifically rejected repeal by implication. "Requiring 'express reference' to section 407 ensured that Social Security benefits could not be unintentionally limited or modified by past or future legislation." *Id.* at 752. Because section 1091a did not refer to section 407, the court explained, "[t]he Government's interpretation" is precisely "the type of unintentional expansion of an express modification which Congress attempted to eliminate when enacting" section 407(b). *Ibid.*

Second, "when Congress amended section 1091a in 1991, the government was precluded from administratively offsetting Social Security benefits to collect claims of the United States in all circumstances. Clearly then, when Congress eliminated all statutes of limitation with respect to student loan collections in 1991, it could not have contemplated or intended that this sweeping legislation would permit the government to offset Social Security benefits in the future." *Id.* at 753.

Third, when Congress authorized the offset of Social Security benefits, it "expressly retained the ten year statute of limitations" on the government's authority to collect debt by means of offset, 31 U.S.C. § 3716(e), thus "preventing the offset of Social Security and other benefits for claims which had been long outstanding." *Id.* at 757. As the court explained, based on both the legislative history surrounding the DCIA and the fact that the DCIA left the DCA's ten-year limitations period intact, "[t]he unbridled ability to offset social security benefits was not intended

by Congress." *Ibid.* A government appeal to the Sixth Circuit was voluntarily dismissed after the case became moot. See *Guillermety v. Secretary of Education*, 03-1604 (6th Cir. Sept. 24, 2004) (unpublished order).

In this case the district court, after reviewing Education's arguments, noted that they were "identical to those made" in *Guillermety*, and, after an examination of the statutes, concluded that "Education's argument regarding the applicability of § 1091a to offsets of Social Security benefits cannot be sustained." Pet. App. 10a. The court found *Guillermety* persuasive, and the court adopted the reasoning of the *Guillermety* decision. The district court took issue with Education's argument based upon the "chronology of the enactment of the statutes involved." *Id.* at 11a. "When Congress removed all statute of limitations obstacles in § 1091a, it could not have contemplated that its actions would have any effect on Social Security payments because such payments were not yet subject to offset." (citing *Guillermety*, 241 F. Supp.2d at 753) *Ibid.*

The district court interpreted the statutes to give effect to the two primary objects of the legislation: "Congress declared in [the HEA] that there would be no limitations on when student loans could be collected. This statute controls the time for collecting past due amounts." *Id.* at 11a-12a. On the other hand, the court observed that the DCIA's statute of limitations "controls the sources of funds to which Education can look to satisfy its claim. Section 3716 does not limit Education's time in which to collect student loans, rather it limits Education's ability to look to Social Security benefits for repayment." *Id.* at 12a.

The Eighth Circuit affirmed on the basis of the district court's "well-reasoned" opinion. Pet. App. 4a. In

reviewing the district court's opinion, the Eighth Circuit emphasized that Congress, when it amended the Higher Education Act in 1991, "could not have contemplated that its actions would have any effect on Social Security payments, because payments were not subject to offset"; and that the "subsequent Congressional approval of offsetting social security benefits did not import § 1091a into the social security context, because Congress expressly left the ten-year disabling provision intact." *Id.* at 3a.

The only case to adopt the Department of Education's position is *Lockhart v. United States*, 376 F.3d 1027 (9th Cir. 2004). The Department of Education raises the same arguments as those made in *Lockhart*. Like the decision in *Lockhart*, those arguments cannot be sustained when viewing the legislative enactments as a whole.

First, *Lockhart* does not mention the points raised in the district court opinions in this case and *Guillermety*, much less respond to their rationale. The Ninth Circuit's statutory analysis is superficial and, in some respects, based upon incorrect assumptions. With respect to the Social Security Act's anti-alienation provision, 42 U.S.C. § 407, the court concluded that since § 407 did not mention offsets by the government, offsets may not be included in the protection provided by § 407. *Lockhart*, 376 F.3d at 1029. The Ninth Circuit apparently believed that the entire anti-alienation provision was an "amendment" enacted in 1983, one year after Congress authorized the use of administrative offset in the Debt Collection Act, 31 U.S.C. § 3716(e). This is incorrect. Although section 407(b), which requires Congress to make "express reference" to section 407 to limit its reach, was enacted in 1983, the language discussed by the Ninth Circuit, which strictly prohibits any attachment of benefits, was part of the

original Social Security Act of 1935. See Social Security Act, ch. 531, Title II, § 208, 49 Stat. 625 (1935). It therefore makes little sense to interpret the meaning of the anti-alienation provision in light of the Debt Collection Act amendment, enacted decades later.

The suggestion that the administrative offset of public assistance benefits is not included in section 407's broad sweep is foreclosed by the Supreme Court's decision in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973), a case *Lockhart* does not cite. As the Supreme Court explained, section 407 imposes a "broad bar against the use of any legal process to reach all social security benefits." *Id.* at 417.

The *Lockhart* decision's cursory analysis entirely overlooks a key question: how the 1991 HEA amendment, which eliminated any period of limitation applicable to student loan collection, and on which the government's position relies, could possibly have eliminated limitations applicable to the offsetting of Social Security benefits, since such offsetting was not permitted at the time.

The *Lockhart* decision lacks any acknowledgment that section 407(b)'s "express reference" requirement might be relevant to the analysis. Given 407(b)'s requirement that any modification be by "express reference" to section 407, and the HEA amendment's lack of any reference to section 407, the HEA amendment cannot properly be interpreted to modify section 407's anti-alienation bar.

Finally, *Lockhart* also appears to rest on an unsupported assumption that the 1991 amendment to the Debt Collection Act, which allowed the offset of Social Security benefits for the first time, "remove[d] any protection under section 407 that Social Security benefits may have had

from offset." 376 F.3d at 1030. As stated above, there is no reason to assume that Congress, by authorizing the offsetting of benefits, intended to eliminate any protection whatsoever afforded by section 407. The legislative history of the amendment, and the text and history of section 407, all suggest the opposite – that Congress, in recognition of the importance of Social Security benefits in providing basic needs for many recipients, intended to allow offset, subject only to any pre-existing legal safeguards. See *Guillermety*, 241 F. Supp.2d at 750-57.

The arguments of the Department of Education are not sustainable for the same reasons that the *Lockhart* decision cannot be supported.

The Department of Education also argues that the decision of the Eighth Circuit below undermines student loan collection activities. This is not correct.

First, the decision carefully limits its parameters to Social Security offsets. The decision concludes: "The Department of Education remains free to pursue payment on the defaulted loans from Ms. Lee; it simply cannot take money from her monthly social security check to reduce the debt." Pet. App. 4a.

Second, the Department of Education's debt collections methods are expansive and varied. In addition to all traditional collection methods, Education may seize federal income tax refunds, garnish the wages of federal employees, and garnish wages of private workers all without judicial involvement and based upon determinations made by the agency alone.

Third, Congress did not intend that Social Security offsets be unlimited. The legislative history makes clear

that the offset of Social Security benefits was to be undertaken in a limited manner in order to avoid possible harm to recipients: "Such safeguards are critical when benefits such as Social Security are the sole or major source of income for the debtor." H.R. Conf. Rep. No. 104-537, 104th Cong., 2d Sess., 142 Cong. Rec. H3842, H4042-43 (Apr. 25, 1996).

The decision of the Eighth Circuit is correct and honors the plain language of the statutory provisions and congressional intent in achieving resolution of the issue.

CONCLUSION

The petition for certiorari should be denied.

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(3)

No. 04-1139

In the Supreme Court of the United States

MARGARET SPELLINGS, SECRETARY OF EDUCATION,
PETITIONER

v.

DEE ELLA LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Despite the fact that Congress in the Higher Education Act (HEA) has expressly abrogated all otherwise applicable statutes of limitations for collection of student loans, 20 U.S.C. 1091a, the Eighth Circuit has held that the Secretary of Education is barred by the ten-year limitation period under the Debt Collection Act, 31 U.S.C. 3716(e)(1), from collecting defaulted student loan debt by offsetting a portion of the debtor's Social Security benefits. That holding squarely conflicts with the decision of the Ninth Circuit in *Lockhart* v. *United States*, 376 F.3d 1027 (2004), petition for cert. pending, No. 04-881 (filed Dec. 29, 2004), and eviscerates the HEA's abrogation of limitation periods with respect to the collection of student loans by Social Security offset. Because the offset of Social Security benefits is central to the collection of defaulted student

loan debt, the Eighth Circuit's decision clearly warrants this Court's review.

A. The Square Conflict In The Circuits Warrants This Court's Review

1. Respondent concedes that the court of appeals' holding is directly contrary to the Ninth Circuit's decision in *Lockhart*, *supra*, on the question whether the Debt Collection Act's ten-year statute of limitations applies to the collection of delinquent federal student obligations by Social Security offset. Br. in Opp. 7-8; see also Pet. 10-11. Respondent nonetheless argues that the conflict does not merit this Court's review because the decision below and *Lockhart* represent the only two appellate decisions on point. That fact is hardly surprising, however, because the Department of Treasury's offset program was not fully operational with respect to Social Security benefits until 2002. Pet. 5. Moreover, in addition to the published decisions noted by respondent, Br. in Opp. 8, other debtors in unreported cases have objected to Social Security offsets beyond a ten-year period.[1]

Furthermore, now that the Eighth Circuit has issued a published decision holding that the Secretary of Education may not offset Social Security benefits beyond a ten-year period, it is highly likely that debtors residing in the Eighth Circuit and other circuits will rely on the decision below to contest the Secretary's authority to offset Social Security benefits beyond a ten-year period. The scope of the potential problem is

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[1] *Cummins* v. *Department of Educ.*, No. CV-05-478 PHX JAT (D. Ariz. filed Feb. 10, 2005); *Ricketts* v. *Department of the Treasury*, No. IP 02-651-C-Y/K (S.D. Ill. filed Aug. 16, 2002); *Roselli* v. *Department of Educ.*, No. 01-CV-504 (E.D. Va. filed Aug. 7, 2001).

illustrated by the fact that approximately $3.6 billion in delinquent student loan debt is over ten years old. Pet. 13.

Respondent also suggests that either the Eighth Circuit or the Ninth Circuit might revisit their respective decisions. He relies on the fact that the decision below apparently was rendered without regard to *Lockhart* and that neither decision "took a strident position on the issues raised." Br. in Opp. 11. But the Secretary in this case petitioned for rehearing en banc, citing the Ninth Circuit's recent decision in *Lockhart*. The court of appeals nonetheless denied rehearing en banc, declining to revisit its decision in light of the Ninth Circuit's contrary holding. Pet. App. 15a. There is likewise no reason to conclude that the Ninth Circuit will reverse course, because its decision is compelled by the plain language of the HEA. See pp. 6-7, *infra*.

In any event, neither the number of decisions addressing the question presented nor the hypothetical possibility that the circuit conflict may dissipate at some point in the future detracts from the substantial and recurring importance of the question presented for the daily administration of the federal student loan program. The Secretary of Education has a strong interest in the uniform and evenhanded collection of defaulted student loan debt across the nation. Pet. 11. Thus, contrary to respondent's suggestion, the court of appeals' decision merits this Court's review, not just because it places an administrative "burden" on the Secretary (Br. in Opp. 8), but primarily because it creates an inequitable and arbitrary regime in which Social Security benefits are subject to administrative offset based on the happenstance of the judicial circuit in which the debtor resides.

Respondent speculates that some debtors may simply acquiesce in Social Security offsets beyond a ten-year period. Br. in Opp. 8. For those debtors in the Eighth Circuit who *do* challenge such offsets, however, the decision below will be controlling. Accordingly, unless the Court grants review and resolves the present conflict in the circuits, the Secretary's collection efforts will occur on a patchwork and uneven basis.

The court of appeals' decision also warrants the Court's review because it prevents the Secretary from using one of the most effective means to collect defaulted student loan debts. Pet. 12-13. Respondent observes that the decision below does not deprive the Secretary of the ability to collect delinquent student loan debt by means other than administrative offset of Social Security benefits. Br. in Opp. 17. Social Security offsets, however, are often the *only* means of recovering defaulted debt in situations like the present case, in which the debtor has no other source of income and for many years has evaded all other attempts at collection. Pet. 13; see also Pet. App. 7a.

2. Respondent further argues that Congress may resolve the circuit conflict by removing the present ten-year limit on administrative offset in the Debt Collection Act. Br. in Opp. 9-11. She observes that such a result was proposed in an unenacted bill that was introduced in September 2004, and in a bill that was recently introduced in the House. See H.R. 1427, 109th Cong., 1st Sess. (Mar. 17, 2005). The mere introduction of a bill, however, does not eliminate the need to resolve the square conflict in the circuits. There is no indication that the current bill is likely to pass and, empirically, the likelihood of passage of any particular bill is remote. 151 Cong. Rec. D96 (daily ed. Feb. 15, 2005) (resume of

congressional activity during 2003) (table indicating that 198 public bills were enacted into law out of 5704 bills introduced).

Contrary to respondent's suggestion (Br in Opp. 9-10), moreover, the bills were not directed at student loans or the court of appeals' decision. Rather, the bills are much broader in scope. They would remove the ten-year limit for *all* federal agencies and thus would have the effect of extending the HEA's abrogation of statutes of limitations for the collection of student loan debt to the collection of other federal debt by administrative offset. There is therefore no basis for concluding that Congress will pass the bill to overturn the result reached by the court of appeals.

B. The Court of Appeals' Decision Is Incorrect

1. Respondent defends the court of appeals' decision, arguing that the ten-year statute of limitations in the Debt Collection Act, 31 U.S.C. 3716(e), overrides the specific provision in the HEA that removes any statute of limitations for the collection of student loan debt, 20 U.S.C. 1091a. Respondent reiterates the court of appeals' reliance on Section 207 of the Social Security Act, which requires an express reference to Section 207 before Social Security benefits may be subject to administrative offset (42 U.S.C. 407(a) and (b)), and on the fact that the HEA was passed in 1991, before Congress in 1996 expressly made Social Security benefits subject to administrative offsets (31 U.S.C. 3716(c)(3)(A)(i)). Br. in Opp. 12-17. Regardless of the merits of those contentions, this Court's review is warranted because the Ninth Circuit in *Lockhart* has squarely rejected respondent's arguments and has concluded that the Secretary may collect defaulted

student loans by Social Security offsets beyond the ten-year period specified in the Debt Collection Act.

In any event, respondent's contentions are unsound. The plain language of the HEA abrogates all statutes of limitations that would otherwise apply to the collection of student loan debts, including by administrative offset. The HEA thus states that, "*[n]otwithstanding any other provision of [law], * * * no limitation shall terminate the period within which * * * an offset*" can be taken by the government "for the repayment of" educational loans. 20 U.S.C. 1091a(a)(2)(D) (emphasis added). That provision unambiguously bars application of the ten-year limitation that would otherwise apply under the Debt Collection Act, 31 U.S.C. 3716(e). Indeed, respondent acknowledges that the pending proposed bill (which eliminates the ten-year period under the Debt Collection Act) would permit the Secretary to offset Social Security benefits beyond a ten-year period, even though the current bill does not expressly reference Social Security benefits. Br. in Opp. 9-11. It is simply irrelevant that the Social Security Act, 42 U.S.C. 407(a) and (b), requires an express reference to Section 207 before Social Security benefits can be subject to offset. The Debt Collection Act itself contains the requisite express reference indicating that social security benefits are *subject to offset*. 31 U.S.C. 3716(c)(3)(A)(i) ("Notwithstanding any other provision of law (including section[] 207 * * * of the Social Security Act * * *), all payments due to an individual under * * * the Social Security Act * * * shall be subject to offset under this section."). There is no further requirement that modifications to the limitations periods applicable to expressly authorized

offsets themselves include an additional express cross-reference to Section 207.

Nor is it relevant that the HEA was passed before Congress made Social Security benefits subject to administrative offset. The HEA, by its own terms, applies "[n]otwithstanding any other provision of statute, regulation, or administrative limitation," 20 U.S.C. 1091a(a)(2)(D), *i.e.*, the HEA operates without regard to any statute of limitations that would otherwise bar the Secretary from collecting student loan debt. See also 20 U.S.C. 1091a(a)(1) ("It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced."). Thus, the 1996 amendment to the Debt Collection Act, which was designed to *strengthen* the government's collection efforts by expressly making Social Security benefits subject to offset, cannot be read to *limit* the plain terms of the HEA or to defeat the manifest purpose of Congress to permit the Secretary to collect defaulted student loan debt without regard to any limitation periods.

2. Respondent also argues that the legislative history of the 1996 amendment to the Debt Collection Act indicates that the conferees intended that the government follow "safeguards" before engaging in the administrative offset of Social Security benefits. Br. in Opp. 5-6, 18. But there is no dispute that the Departments of Treasury and Education have fully complied with the "safeguards" mentioned by the conferees, *i.e.*, limiting the amount of benefits subject to offset and implementing procedures to consider exemptions for exceptional hardships. 142 Cong. Rec. 9081-9082 (1996).

Respondent erroneously suggests that one of the "critical" safeguards is the ten-year time limit under 31 U.S.C. 3716(e). Br. in Opp. 18. But nothing in the conference report refers to the ten-year period or suggests that Congress did not intend the plain terms of the HEA to apply when Social Security benefits are offset in order to satisfy the collection of student loans.[2]

C. The Court Of Appeals' Decision Presents An Appropriate Vehicle To Resolve The Conflict In The Circuits

Respondent does not dispute the Secretary's submission that the record is fully developed in this case and there are no obstacles that would prevent this Court from resolving the issue that has divided the circuits. Pet. 8. Instead, respondent argues that *Lockhart* v. *United States*, petition for cert. pending, No. 04-881 (filed Dec. 29, 2004), presents an equally suitable vehicle because "[t]he individuals in this case and *Lockhart* both had student loans outstanding for at least ten years." Br. in Opp. 11. As set forth in the government's response to the petition in *Lockhart* (at 14-16), the Secretary believes that either of these cases would constitute an appropriate vehicle for the Court to resolve the question presented but that this case

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[2] Respondent is correct that the Secretary's records reflect that respondent applied for a disability discharge of her student loan debt but that the Secretary on April 10, 1992, denied her application because her condition had not changed since she incurred her debt in 1978. The statement in the petition (at 13 n.2) was intended to reflect the fact that respondent has not sought a disability discharge since the Secretary began offsetting her Social Security benefits in 2001. As respondent notes (Br. in Opp. 12), respondent remains free to seek a disability discharge if she believes that she can meet the applicable criteria for such relief.

involves a more fully developed record, as well as a determination by both courts below that the ten-year limit under the Debt Collection Act has expired and that the Secretary is barred from utilizing Social Security offsets to collect the defaulted debt. Pet. App. 4a, 14a. By contrast, in *Lockhart*, the record is incomplete in some respects, and the issue whether any of the debtor's loans have been outstanding beyond ten years has never been litigated, much less decided. The Court accordingly may wish to grant review in this case or, in the alternative, to grant review in both cases and consolidate the two cases for briefing and argument. See Pet. 8 n.1 (noting the government's willingness to be realigned as respondent in both cases); see also Reply at 2-3 n.*, *Lockhart*, *supra* (No. 04-881).

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted or, in the alternative, the petition should be held pending the Court's disposition of *Lockhart* v. *United States*, No. 04-881.

Respectfully submitted.

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Acting Solicitor General

APRIL 2005